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No. 84-1041

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

AIR JAMAICA LIMITED, *et, al.*,
Appellants,

v.

STATE OF FLORIDA, DEPARTMENT OF REVENUE,
Appellee.

On Appeal from the Supreme Court of the State of Florida

APPELLANTS' REPLY BRIEF

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Pursuant to Supreme Court Rule 16.5, Air Jamaica Limited and the other foreign airline appellants in this proceeding ("Appellants") submit this reply brief in opposition to the motion of the State of Florida to dismiss this appeal or to affirm the judgment of the court below. The Appellants will address only two points made by the State of Florida: (1) that the Florida tax violates the provisions of the various international agreements and is inconsistent with this Court's decision in *Japan Line Ltd. v. County of Los Angeles,* 441 U.S. 434 (1979).

Appellee in its Motion to Dismiss has stated, ". . . that the exemption sought by foreign airlines is inconsistent with the Articles in the various agreements...." The basis of Appellee's statement is founded on the theory that there will be a destruction of competitive equality between foreign and domestic airlines because the domestic airlines would be taxed on fuel purchases in Florida and foreign airlines would not.

Appellee has totally missed the main purpose of the international agreements. Each international agreement states in material part, "Each contracting party shall exempt the designated airline or airlines of the other contracting party to the fullest extent possible under its national law, on the basis of reciprocity, from . . . ." The issue is exempting foreign airlines in the United States, and domestic airlines in foreign countries, *not* domestic airlines within their own country of domicile. It is the state of Florida that attempts to violate the reciprocal international agreements by taxing foreign airlines that are not permitted by federal law to enter into intra or interstate commerce.

Florida's attempt to invade the federal government's exclusive domain of foreign commerce will have an adverse affect on all domestic carriers no matter what state they depart from.

Florida's attempt at violating the reciprocal international agreements has caused threatened retaliation from some of Appellants' governments. Appellant, Air Jamaica's goverment has expressed concern over the breach of the Protocal between U. S. and Jamaica. Appellants have attached the diplomatic message to its Jurisdictional Statement in the Appendix, page 128, 129. Since the filing of Appellants' Jurisdictional Statement, Appellant, TACA International Airline's government of El Salvador

has transmitted a similar diplomatic message to the U. S. Ambassador for El Salvador.[1]

Appellee attempts to further cloud the issue by stating that material parts of some of the International Agreements of issue are not self-executing. As an example Apellee cites Art. 10(6), Air Transport Service Agreement between the United States of America and Jamaica, October 2, 1969, T.I.A.S. 6770, which states:

> Each party shall use its best effort to secure for the designated airlines of the other Party, on the basis of reciprocity, an exemption from taxes, duties, charges and fees imposed by State, regional and local authorities on the items specified in paragraphs A of Article 8 of the agreement, as well as from fuel through-put charges,. . . .

The key phrase which Appellee ignores is, ". . . on the basis of reciprocity, ..." Reciprocity is the self-executing provision of this article. The American Law Institute's Restatement of Foreign Relations Law of the United States (Second) (1965) gives an illustration explaining §143, Effect on Domestic Law of Executive Agreement Authorized by Act of Congress, as follows:

> 2. Pursuant to an act of Congress authorizing him to make agreements with respect to imports of textiles, the President makes an executive agreement with state A *providing for reciprocal entry* and non-discriminatory treatment of textiles. A

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[1]Diplomatic note No. 14139 submitted by the Embassy of the Republic of El Savador to the U.S. Department of State (Dec. 3, 1984).

> statute of one of the states of the United States discriminates against textiles from A. *The executive agreement is self-executing* and takes effect as domestic law superseding the discriminatory statute. (emphasis added)

Appellant would also point out that the international agreements that Appellee relies upon contain "most favored nations" clauses in the Articles dealing with exemption from taxes on fuel. In *Aerovios Interamericanas de Panama, S.A. v. Board of County Commissioners of Dade County, Florida,* 197 F. Supp 230 (S.D. Fla. 1961), rev'd on other grounds, 307 F.2d 802 (5th Cir. 1962). Judge Lieb stated at page 247,

> Finally, treaties which contain the so-called "most favored nation" clause are uniformly held to be self-executing.

Finally, Appellee would have this Court believe that the decision of the Florida Supreme Court respecting the foreign airlines is consistent with this Court's decision in *Japan Line Ltd. v. County of Los Angeles,* 441 U.S. 434 (1979). In *Japan Line Ltd.,* this Court set forth two additional requirements to the "four prong" test referred to in *Complete Auto Transit v. Brady,* 430 U.S. 274 (1977). The requirements are whether the tax creates a substantial risk of multiple taxation and whether the tax prevents the federal government from ". . . speaking with one voice when regulating commercial relations with foreign governments."

The cargo containers in *Japan Line Ltd.,* were subjected to a property tax levied in the state of California and taxed

at full value in Japan. Likewise, the issue herein is whether the state of Florida may assess a tax which will create an asymmetry in the international tax structure.

Appellee misses the reasoning of *Japan Line Ltd.* Appellee assumes that the risk of double taxation is that when a foreign airline purchases fuel in the state of Florida, pays the tax at issue, and returns to its home country, the same fuel will be subjected to a tax at the home country. Although this is the fact pattern in *Japan Line Ltd.*, the real danger in the Florida tax is that it will create retaliatory taxes in foreign countries for domestic carriers thereby creating an asymmetry in the international tax structure.

This Court recognized in *Japan Line Ltd.*:

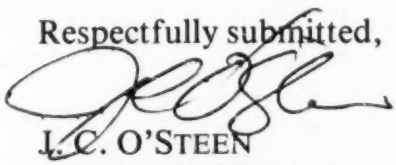
> If a novel state tax creates an asymmetry in the international tax structure, foreign nations disadvantaged by the levy may retaliate against American-owned instrumentalities present in their jurisdictions. Such retaliation of necessity would be directed at American transportation equipment in general, not just that of the taxing state, so that the Nation as a whole would suffer.

The risk of retaliation by Jamaica and other foreign countries as previously referenced, is acute, and of necessity, such retaliation would be felt by the Nation as a whole. If the state of Florida is allowed to fire the first shot in an international tax war, other forms of domestic transportation will be subjected to the retaliatory taxes. The result would be another form of multiple taxation

and would make speaking with one voice impossible. As in *Japan Line Ltd.*, "[Florida] by its unilateral act, cannot be permitted to place, these impediments before this Nation's conduct of its foreign relations and its foreign trade." Likewise, Florida may not tell this Nation or the foreign countries involved how to run their foreign policies.

The motion of the State of Florida should be denied, and probable jurisdiction should be noted.

Respectfully submitted,



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